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In The Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-678

SHELL OIL COMPANY,
Petitioner

v.

ANNE M. DAKTT,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR SHELL OIL COMPANY AS PETITIONER

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In its Petition for Certiorari, Shell Oil Company did not have the benefit of the recent decision by this Court in *Electrical Workers v. Robbins & Myers, Inc.*, Nos. 75-1264 and 75-1276, decided on December 20, 1976. For the reasons stated herein, Shell Oil Company submits that the decision in *Robbins & Myers* increases the importance

of review of the instant cause by this Court and requires reversal of the decision below.

In the *Robbins & Myers* decision, this Court held that, when Congress specifies that a defendant receive a particular type of notice within an established period of time, it is not within the province of the courts to alter those requirements based upon equitable considerations. As this Court stated in *Robbins & Myers:*

> But the principal answer to this contention is that Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a "slight" delay equally acceptable. In defining Title VII's *jurisdictional prerequisites* "with precision" [citations omitted], Congress did not leave to the courts the decision as to which delays might or might not be "slight." (Emphasis supplied)

This is precisely the issue presented here. The court below held that it had the power to judicially alter a "jurisdictional prerequisite" (the time period for fulfilling the 29 U.S.C. §626(d) notice requirement), based upon equitable considerations. This holding appears to be in conflict with the decision by this Court in *Robbins & Myers,* as well as with decisions by the Fifth, Sixth and Eighth Circuits.[1] As a result, the issue presented by the instant case of whether the lower court could properly excuse timely compliance with a jurisdictional prerequisite is an important question which should be decided by this Court.

In addition, the *Robbins & Myers* decision also supports the contention by Shell Oil Company that mere notice of a claim by a plaintiff, which is not in the form or manner contemplated by the applicable statute, is insuffi-

[1] *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974); *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1976); *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975).

cient to toll the time for compliance with the statutory notice requirements. In *Robbins & Myers,* the plaintiff notified her employer only two days after her discharge that she believed her discharge to be "unfair." However, this Court found that this action by the plaintiff was insufficient to adequately notify her employer that the plaintiff intended to pursue her Title VII cause of action. Based upon this lack of adequate notice to the employer, this Court held that no tolling of the time for filing an EEOC charge would be permissible.

The touchstone of the *Robbins & Myers* decision is, therefore, whether the defendant received adequate, timely notice of the actions which the plaintiff intended to take against it. The Department of Labor contends that a defendant receives adequate notice under 29 U.S.C. §626(d) that a plaintiff intends to sue it by a simple assertion by the plaintiff that she has been a victim of age discrimination. In the view of the Department of Labor, mere identity in the cause of action being asserted is sufficient to bring into play the tolling principles enunciated by this Court in *Burnett v. New York Central R.R. Co.,* 380 U.S. 424 (1965).

Shell Oil Company submits that this reading of *Burnett* is far too restrictive and ignores the statutory procedures established by Congress for enforcement of A.D.E.A. rights. Under the A.D.E.A., there are two distinct remedies available to a plaintiff. One is to bring a private lawsuit, and the other is to file a claim with the Department of Labor and to rely upon its administrative or judicial actions. Every other Circuit ruling on this issue has found that a mere assertion of a claim of age discrimination, without a specific notice to the Department of Labor of an intent to bring a private suit, is insufficient to give an employer the statutorily-required notice that it will be

sued.[2] Because the A.D.E.A. provides two separate and independent remedies, and because Congress has specifically established notice requirements to defendants regarding an intention by a plaintiff to invoke the private litigation remedy, the instant case is closely analogous to the situation presented in *Robbins & Myers*. There, this Court held that pursuit of one legal avenue for the remedy of racial discrimination did not put the defendant on notice that the plaintiff intended to pursue alternate legal remedies, and thus no tolling was permissible. Accord, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36.

Shell Oil Company submits that the reasoning of the district court in this case as to the inapplicability of *Burnett* is persuasive. As the district court stated:

> The fact that the plaintiff commenced action in a court of competent jurisdiction and served defendant with timely notice was central to the *Burnett* decision. There was no comparable action herein by which Defendant was notified of an action against it. The rationale of *Burnett* is therefore inapplicable to this case. (Pet. 13a)

As a result, this case presents the additional important question of whether the *Burnett* tolling principle is inapplicable to situations where the defendant did not receive the notice contemplated by the statute as to the intent by the

[2] *Powell v. Southwestern Bell Telephone Co., supra; Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1975); *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975). Indeed, the Tenth Circuit tacitly admitted that such an assertion does not convey the required notice contemplated by the statute when it stated that: "To hold that a complaint to the Labor Department of an alleged discriminatory employment practice complies with this requirement, even though the complaint never mentions an intent to file a private civil action under the ADEA, would be in complete disregard of the language of the Act." (Pet. 19a)

plaintiff to bring suit. In *Burnett*, the defendant was timely and properly given notice of the lawsuit of the plaintiff by service of process made in accordance with the statute. There was no defect in the notice given, but only a defect in venue. Here, it is undisputed that Shell Oil Company never received any timely notice, in the manner contemplated by the statute, that a suit was being brought against it. Therefore, the district court herein properly found that *Burnett* did not apply to the facts of this case, and the Tenth Circuit erroneously reversed that finding.

There is a clearcut conflict between the decision below and that of other Circuits as to the type of notice which must be given to a defendant in order to minimally satisfy the Congressionally-mandated notice requirement set forth in 29 U.S.C. §626(d). This is an important question concerning the interpretation and application of the A.D.E.A. which has not been, but should be, decided by this Court. Therefore, Shell Oil Company submits that this Court must grant certiorari to resolve these issues.

Respectfully submitted,

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